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February 6, 2001

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 01-9/ Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts

Dear Ms. Salas:

Please accept for filing in the above-referenced proceeding the attached Comments of AT&T Corp. in Opposition To Verizon New England Inc.'s Section 271 Application for Massachusetts. Pursuant to the Public Notice issued January 16, 2001 (DA 01-106), AT&T is submitting an original and one copy of its Comments and supporting exhibits in redacted form.

Finally, in accordance with the Public Notice, AT&T requests that all of its submissions in CC Docket No. 00-176 – including AT&T's Comments, Reply Comments, and *ex parte* submissions in that proceeding – be incorporated into the record of CC Docket No. 01-9. As required in the Notice, AT&T has also made this request in the attached Comments.

Thank you for your assistance in this matter.

Very truly yours,

Richard E. Young

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts	)	CC Docket No. 01-9

COMMENTS OF AT&T CORP. IN OPPOSITION TO VERIZON NEW ENGLAND INC.'s SECTION 271 APPLICATION FOR MASSACHUSETTS

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Filed: February 6, 2001

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For Authorization to Provide In-Region,	)	
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COMMENTS OF AT&T CORP. IN OPPOSITION TO VERIZON NEW ENGLAND INC.'s SECTION 271 APPLICATION FOR MASSACHUSETTS

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to the application of Verizon New England, Inc. ("Verizon") to provide in-region, interLATA service in Massachusetts.

INTRODUCTION AND SUMMARY

In its supplemental filing, Verizon attempts to portray as settled the issue of whether its prices in Massachusetts for unbundled network elements ("UNEs") meet the requirements of Section 271. According to Verizon, "there is no issue" with respect to UNE pricing, because its UNE rate levels in Massachusetts are identical to those in New York, which this Commission "approved" in its decision authorizing Verizon to provide long-distance service

in New York.[1] Thus, Verizon concludes, "that is the end of the matter." Verizon Br. at 39. Verizon is wrong.

Verizon's argument is but the latest of its attempts to divert the Commission's attention from its inability to show that its UNE rates comply with the Total Element Long-Run Incremental Cost ("TELRIC") standards established by the Commission. Like its initial application, Verizon's latest filing includes absolutely no evidence that its rates are TELRIC-compliant.

Verizon's failure to provide evidence showing that its rates are cost-based is particularly striking in view of the history of its previous application. The failure of that application to provide sufficient evidentiary support for the UNE prices in Massachusetts was cited by the Department of Justice as a reason for its recommendation that the application be denied.[2] The DOJ's criticism, and the CLECs' evidence demonstrating that the UNE rates are not at TELRIC levels, were likely factors in Verizon's decision to withdraw its application on December 18, 2000. At the time Verizon withdrew its application, it was certainly expected that Verizon would either revise its rates substantially downward, or would at least include evidence in its supplemental filing showing that its rates met TELRIC standards.[3] But Verizon has done neither.

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[1] See Supplemental Filing of Verizon New England ("Verizon Br.") at 3, 39; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd. 3953 (1999) (*"BA-NY Order"*), ¶¶ 238-262.

[2] *See, e.g.,* Evaluation of the Department of Justice filed October 27, 2000 in CC Docket No. 00-176 (("DOJ Eval."), at 20 ("there is no underlying documentation to show that the listed rate reductions . . . are cost based in Massachusetts").

[3] For example, then-Chairman Kennard stated that among the "issues that have been raised in this record" that Verizon "needs to address" in its new application was the "[p]ricing of elements used by competitors, which reflects forward-looking costs." Statement of FCC Chairman William E. Kennard on Verizon 271 filing, issued December 18, 2000.

The reason for the absence of supporting cost evidence in Verizon's application is obvious: Verizon's UNE prices are *not* cost-based. Moreover, circumstances have not changed since Verizon withdrew its application in December. Thus, the UNE rates in Massachusetts remain far above TELRIC, and CLECs are still generally unable to serve residential customers through the use of the UNE Platform.[4] As before, the reason for the exceedingly low level of UNE-P competition is the same: UNE rates in Massachusetts are so high that CLECs cannot afford to compete against Verizon for residential customers using UNE-P. Given that UNE-P is a critical entry vehicle to open the residential market to competition, Verizon offers no basis for the Commission to conclude that the market is irreversibly open to competition.

Rather than refute the CLECs' evidence with testimony or supporting documentation, Verizon simply repeats the same simplistic argument that it made in support of its prior application: (1) the Massachusetts UNE rates are at the same levels as the current UNE rates in New York; (2) the Commission "approved" the New York UNE rates in the *BA-NY Order*: (3) *ergo*, the Massachusetts rates are TELRIC-compliant. Verizon Br. at 38-39. Although Verizon is wrong on all counts, its most important misstatement is that the Massachusetts UNE rates comply with TELRIC standards.

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[4] Although Verizon claims that the number of lines served through the UNE-P increased from 15,000 in September to 23,000 in November, the November figure still represents less than 3 percent of the 800,000 lines that, according to Verizon, CLECs now serve in Massachusetts. Verizon Br. at 4, Att. B. Furthermore, unlike its original application, which broke out UNE-P use between business and residential customers, Verizon's supplemental filing does not describe what portion of the lines served by UNE-P are residential. But even if all of the new UNE-P customers were residential – an exceedingly dubious assumption – that would mean that only approximately 16,900, or less than six-tenth of one percent, of all residential lines in Massachusetts are now served through the UNE-P. *See* Declaration of William Taylor, ¶¶ 25 Att. & A, Exh. 2, in Application of Verizon New England filed September 22, 2000 in CC Docket No. 00-176 (stating that 5,900 residential customers were served through UNE-P as of July 2000); Verizon Br., Att. B (a total of 23,000 lines were served through UNE-P as of November, as opposed to 12,000 lines in July); *Statistics of Communications Common Carriers*, Table 2.4 (FCC report dated December 31, 1999) (total number of residential access lines in Massachusetts is approximately 2.9 million).

First, Massachusetts UNE rates do not even come close to coming within "the range that the reasonable application of TELRIC principles would produce." *See BA-NY Order*, ¶ 244. The evidence submitted by AT&T and WorldCom in response to Verizon's previous application demonstrated that Verizon's cost studies suffered from fundamental flaws that substantially overstate Verizon's UNE costs. Furthermore, as described in detail below, a comparison of Verizon's rates to those in other States, including use of the Commission's Synthesis model in a manner similar to that which the Commission performed in its recent order involving Kansas and Oklahoma, confirms that Verizon's rates are well above TELRIC levels.

Second, the current Massachusetts switching rates are not "the same" as the New York switching rates. While the Massachusetts switching rates are permanent, the New York switching rates are only interim rates; the latter are subject to a true-up, which will be made after the conclusion of the ongoing cost proceeding in New York – which the *BA-NY Order* acknowledged would be occurring. The *BA-NY Order* granted Verizon's New York application based on a standard of review that permitted denial of the Section 271 application on pricing grounds only for truly egregious errors by the New York Public Service Commission ("NYPSC") reflecting a substantial misapplication of TELRIC principles – not for "isolated [erroneous] factual findings."[5] The Commission, however, also recognized that (1) Bell Atlantic's UNE rates

[5] The Commission stated:

> In reviewing state pricing decisions in the context of section 271 applications, we will not reject an application because isolated factual findings by a [State] commission might be different from what we might have found if we were arbitrating the matter under section 252 (e)(5). Rather, we will reject the application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.

BA-NY Order, ¶ 244.

-- including its switching rates and loop rates -- were to be the subject of an upcoming rate investigation by the New York PSC, where the current switching rates would be subject to true-up, and (2) new evidence submitted to the NYPSC had already called into serious question whether the switching rates were compliant with TELRIC standards. *BA-NY Order*, ¶ 247.

Third, the *BA-NY Order* made no determination of whether the switching rates were TELRIC-compliant in light of the new evidence. Instead, the Commission deferred to the NYPSC to make that finding in its new investigation (where even more evidence would be introduced), and expressly relied on the NYPSC's commitment to ordering a true-up and its demonstrated expertise in arriving at a resolution of the disputed switching rates in a subsequent state proceeding. *Order*, ¶¶ 238, 247. That proceeding, which was commenced in January 1999 (with initial evidentiary submissions occurring in February 2000), is still ongoing, but the evidence there shows that Verizon's UNE rates -- especially its switching usage rates -- are wildly inflated. As a result, Verizon cannot claim that it has met its burden to prove that the switching usage rates it imported from New York to Massachusetts are compliant with TELRIC in Massachusetts. Indeed, to this day, *no* regulatory authority – not the NYPSC, not the DTE and not this Commission – has determined that, in light of this important evidence, Verizon's interim New York (but permanent Massachusetts) switching rates are properly cost-based.

Even if Verizon's Massachusetts UNE rates were consistent with TELRIC (and they are not), the evidence does not support a finding that granting Verizon's application here would be consistent with the "public interest, convenience, and necessity" – the independent determination that the Commission is required to make pursuant to Section 271(d)(3)(C) of the 1996 Act before Verizon may be granted Section 271 authority. Indeed, the evidence clearly establishes that UNE-based entry into the Massachusetts residential market cannot be justified,

because it does not provide CLECs with a meaningful opportunity to compete at current UNE prices. Thus, the entry of Verizon into the long-distance market would enable Verizon to extend its current monopoly over local exchange service into that market as well, because Verizon would be the only LEC capable of providing both local and long-distance service to residential customers to satisfy consumer demand for "one-stop shopping." Such a result, which would leave consumers worse off than before the Act was passed, cannot be found to be in the public interest.

I. VERIZON'S MASSACHUSETTS UNE RATES STILL VIOLATE TELRIC.

The evidence submitted by WorldCom, AT&T and other CLECs in response to Verizon's initial application clearly demonstrated that the UNE rates established in Massachusetts are grossly inflated above TELRIC levels, due to the severely flawed rate methodology proffered by Verizon and adopted by the DTE.[6] Moreover, the additional facts submitted after Verizon "voluntarily" modified its switching and usage rates to New York levels showed that Verizon's Massachusetts rates still were not TELRIC-compliant.[7] Nothing has changed. In any event, Verizon's reliance on the similarity between its Massachusetts rates with those of New York is plainly misplaced, as the Commission's recent order granting SBC Section 271 authority for Oklahoma and Kansas makes clear.[8]

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[6] *See, e.g.*, Reply Comments of AT&T Corp. in Opposition To Verizon New England Inc.'s Section 271 Application For Massachusetts, filed November 2, 2000, in CC Docket No. 00-176 ("AT&T Reply Comments"), at 8-35 and declarations attached thereto. As stated in the cover letter accompanying the instant Comments, AT&T requests that all of its prior filings from CC Docket 00-176, including all *ex parte* submissions by AT&T in that docket, be incorporated into the record of this new proceeding.

[7] *See, e.g.*, AT&T Reply Comments at 27-38 and Declaration of Michael R. Baranowski attached thereto ("Baranowski Decl."); Reply Declaration of Mark T. Bryant attached to Reply Comments of WorldCom filed November 3, 2000 in CC Docket No. 00-176 ("Bryant Reply Decl.").

[8] *See Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, Memorandum Opinion and Order released January 22, 2001 (*"SBC Kansas/Oklahoma Order"*).

A. Verizon's Switching and Related Usage Rates Do Not Satisfy The TELRIC Standard.

With respect to the switching and related usage rates that it filed on October 13, 2000, Verizon concedes that the issue "is whether those rates comply with the Act's cost-based pricing standards, which, under existing rules, means 'whether those rates comply with basic TELRIC principles.'"[9] The evidence in the earlier phase of proceeding shows that – contrary to Verizon's position – the new Massachusetts rates do *not* comply with TELRIC standards.[10]

Specifically, the evidence showed that the switching and related usage rates Verizon initially relied on were grossly inflated, because they were based on numerous inputs and assumptions that were both unreasonable and erroneous (and were contrary to the standards set by this Commission, the positions taken by other incumbent LECs, and even the representations made by Verizon in other proceedings). The numerous flawed inputs and assumptions in Verizon's cost studies included:

- The use of a switch discount rate that failed to account for the full discount that Verizon receives for new switch purchases;
- Overstated installation costs;
- A significant understatement of the number of minutes that switches will be in use;
- An understated utilization factor applied to switch port costs;
- An overstated cost of capital;

[9] Verizon Br. at 38, quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 615 (D.C. Cir. 2000).

[10] *See, e.g.*, AT&T Reply Comments at 28-32 and Baranowski Decl. at 3; Declaration of Mark T. Bryant attached to Initial Comments of WorldCom filed October 16, 2000 in CC Docket No. 00-176 ("Bryant Initial Decl."); Bryant Reply Decl., ¶¶ 3-18. AT&T concurred with the restated switching costs that WorldCom calculated, with the exception of the cost of capital figure that WorldCom used, which AT&T believed should have been 9.47%, rather than 11.25%. When a 9.47% cost of capital rate was used, the switching costs calculated by WorldCom (which were already well below Verizon's current switching rates) were reduced by an additional 8.4%. Baranowski Initial Decl. at 4.

- An improper calculation of the cost of buildings required to provide switching and transport; and
- The use of an overstated factor to estimate the cost of power equipment associated with switching plant.

Correcting these errors in Verizon's studies has the combined effect of reducing local usage rates by 63-67%, analog port rates by more than 77%, local switching usage rates in the range of 63% to 67%, trunk port rates by 79.76%, and common transport rates by 62.2%.[11] Thus, these rates (that were in effect at the time Verizon filed its first application) were 150 to 200 percent above properly calculated TELRIC levels. Although the rate adjustments that Verizon filed with the DTE on October 13, 2000, reduced these rates somewhat, they effectively eliminated only about half of these overages, thus leaving the switching and related usage rates well above TELRIC levels.[12]

Verizon has presented no cost studies or other documentation to prove that its current Massachusetts rates are in fact consistent with TELRIC standards. Instead, Verizon relies entirely on the alleged similarity between its UNE prices in Massachusetts and those in New York, claiming that "the rate levels adopted by Massachusetts are the same as [those in] New York," which are "the very rates the Commission previously approved" in connection with its New York application in 1999. Verizon Br. at 39. Verizon's reliance on the New York rates, however, is totally misplaced. Not only are the Massachusetts UNE rates not the equivalent of the New York rates, but key circumstances that led the Commission to approve the New York application are missing here. The analogy to New York is thus inadequate to support this application, and the recent *SBC Kansas/Oklahoma Order* confirms this point.

[11] *See* Bryant Initial Decl., ¶¶ 4-75.

[12] *See* Bryant Reply Decl., ¶¶ 3-8.

1. The Evidence Demonstrates That the Current Massachusetts Switching Rates Do Not Comply With TELRIC.

During 2000, AT&T introduced evidence in the ongoing New York rate proceeding that the existing interim New York switching and related usage rates (which are now the basis for the permanent Massachusetts rates) fall far short of meeting TELRIC standards.[13] For example, testimony that AT&T submitted to the NYPSC in June 2000 demonstrated that the current switching usage rates (*i.e.*, the rates now on file in Massachusetts) exceed Verizon's forward-looking economic costs by *70 percent* or more, due to such factors as: (1) the failure of Verizon's cost model to use the aggressive new switch purchase discounts offered by its vendors; (2) the inability of Verizon's Switch Cost Information System ("SCIS") model (on which Verizon relies to support its claimed switching costs) to calculate reasonable estimates of the switch prices for the switch configurations that Verizon uses in its study; and (3) Verizon's overstatement of proposed engineering and installation factors.[14]

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[13] The NYPSC initially established switching rates in 1997 in reliance on testimony by Bell Atlantic that it "did not receive large switch discounts from its vendors." *BA-NY Order*, ¶ 247. By 1998, however, subsequent admissions by Bell Atlantic demonstrated that its representations to the NYPSC were *false* – and that the switching costs calculated by the NYPSC were overstated. In September 1998, the NYPSC announced its intention to undertake a "comprehensive reexamination" of all UNE rates commending in January 1999. The NYPSC specifically found that the new evidence on switching "changes the state of the record with regard to vendor discounts" and -- even more significantly – the NYPSC committed itself to order refunds in the event that it found in the new proceeding that the current switching prices were too high. *Order Denying Motion To Reopen Phase 1 and Instituting New Proceeding*, Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, and 98-C-1357 (NYPSC Order issued September 30, 1998), at 9, 12. The NYPSC made clear that its commitment to refunds, or "true-up," applied to switching rates. *See id.* at 12 ("even though all other Phase 1 [UNE] rates are planned to be made permanent, switching rates are planned to be kept temporary, subject to future refund or reparation").

[14] *See* Panel Reply Testimony of AT&T Communications of New York, Inc., submitted June 26, 2000 in NYPSC Case 98-C-1357, at 10-11, 37, 109-150 ("AT&T NYPSC Testimony"). A copy of the public version of AT&T's NYPSC Testimony (without exhibits) is attached hereto as Attachment 1. AT&T will file (under seal) a complete, unredacted copy of this testimony, with all exhibits, with the Commission if the Commission so requests, and assuming that Verizon agrees that such production may include the portions of the testimony that have been redacted from the public version because they contain material that has been designated by Verizon as proprietary in the NYPSC proceeding.

Whatever the outcome of the current UNE proceeding in New York, in Massachusetts, the DTE has not yet followed the NYPSC's lead. Although Verizon made the same misstatements concerning its switch discounts in the 1996-1997 DTE proceedings on UNE rates that it was also making in New York to the NYPSC, the DTE took no action in response to the revelations of Verizon's misconduct. *See* AT&T Reply Comments at 22-23. Only last month did the DTE institute an investigation of the switching rates for TELRIC compliance as part of its broader review of all Massachusetts UNE rates – and has indicated only that it will make a final determination by the end of the year. *See* Verizon Br. at 39 & App. B. Tab 4, Exh. D. This is unsatisfactory, for two reasons.

First, unlike the NYPSC, the DTE has made no commitment to order refunds in the event it concludes that Verizon's rates are too high. Indeed, in Massachusetts, neither Verizon nor the DTE has committed to a true-up. Second, again unlike the NYPSC, which independently acknowledged that CLECs had raised serious issues concerning the switching rates and committed to investigate them, the DTE has consistently failed to acknowledge the problem. It ignored the problem of inflated switching rates when CLECs first raised it, and then rubber-stamped the New-York-based switching rates when Verizon abruptly filed them last October. Thus, to date, the DTE has not demonstrated a level of expertise with, or commitment to, TELRIC comparable to that of the NYPSC. For each of these reasons, the assurances that this Commission had in the New York § 271 proceeding that CLECs would ultimately pay only TELRIC-compliant switching rates, both for switching ordered to date as well as in the future, are not present here.

Critically, *no* regulatory body has determined that, in light of the new evidence presented to the NYPSC since 1998, the current switching usage rates in New York comply with

TELRIC. Thus, Verizon's bald claim that its New York switching rates were "approved" by the Commission simply disregards the facts.[15] At most, the Commission "approved," in the context of the New York application, the NYPSC's achievement in setting TELRIC rates to the extent possible with the evidence before it, and "approved" the NYPSC's decision to address the new switching evidence in a future proceeding with a true-up. In so holding with respect to New York, the Commission certainly did not "end the matter" with respect to *another* State's prices.

2. The BA-NY Order's Assumption That The UNE Rates In New York Would Permit Effective Competition, Which Was An Important Basis For The Commission's Approval of Bell Atlantic's Application, Is Now Highly Questionable.

There is another reason why this Commission's approval of Verizon's New York 271 application does not "end the matter" with respect to pricing in Massachusetts. Specifically, the Commission lacks the *circumstantial* evidence that UNE prices had been set at TELRIC that it relied upon in approving the New York application. To the contrary, all of the circumstantial evidence here suggests that the Massachusetts rates are not cost-based.

In approving Verizon's New York 271 application, the Commission placed great weight upon evidence showing that substantial UNE-based entry in the residential market had *already occurred* in New York, even before the application was filed. Thus, at the time the New

[15] Verizon's assertion that the Commission – or even the NYPSC – "approved" the switching rates in New York is both erroneous and highly misleading. By the time Bell Atlantic filed its Section 271 application for New York in September 1999, the NYPSC's "new" UNE rate proceeding was already underway, but not completed. That proceeding continues today. In its *BA-NY Order,* the Commission made clear that in approving Bell Atlantic's application, it was *not* determining whether the switching rates in New York were consistent with TELRIC standards in light of the new evidence presented to the NYPSC regarding Bell Atlantic's switch discounts. Rather, the Commission noted the new evidence and the NYPSC's representation that the switching rates "may be adjusted in the future to account for [the] newly adduced evidence" that it "will examine in its second network elements rate case." *BA-NY Order,* ¶ 247. Thus, the Commission did not consider the new evidence – and made *no* finding that the "temporary" New York switching rates were TELRIC-compliant in light of that evidence – even as of December 1999, much less as of January 16, 2001 (the date of the instant Massachusetts application). Instead, the Commission stated that it was "plac[ing] great weight on the New York Commission's active review and modification of Bell Atlantic's proposed unbundled network element prices, [and] its commitment to TELRIC-based rates." *Id.* ¶ 238.

York application was filed, the Commission believed that the NYPSC had succeeded in setting UNE prices at a level that, at the existing level of retail rates, had already generated, and would continue to permit, substantial and sustained UNE-based competition for residential customers in New York. Approval of the New York application was thus premised upon the Commission's conclusion that "barriers to competitive entry in the local market have been removed and the local exchange market today is open to competition." *BA-NY Order*, ¶ 426.

Here, the circumstantial evidence concerning TELRIC compliance points in exactly the opposite direction. The record shows overwhelmingly that substantial UNE-based residential competition has not yet taken root in Massachusetts *and will never do so at the current UNE rates*. Even by Verizon's assessment, and assuming all new UNE-P customers are residential customers, fewer than 17,000 residential customers in Massachusetts receive service from a competitor over UNE-P – far fewer than the 137,000 residential lines served in New York at the time of the *BA-NY Order*.[16] This lack of competition is, at the very least, strongly suggestive that Verizon has not yet lowered UNE prices to a level that truly reflects TELRIC.

A margin analysis of retail and UNE rates in Massachusetts provides yet further confirmation that Verizon's UNE rates remain well above TELRIC. As AT&T showed in its *ex parte* submission to the Commission in the earlier Massachusetts proceeding, a CLEC contemplating statewide entry at the prevailing UNE prices in Massachusetts could only expect a *gross* margin of between $1.52 and $3.78 per customer per month, depending upon the proportion of customers who choose a bundled versus an "à la carte" set of local services. That

[16] *See* fn. 4, *supra*; *BA-NY Order*, ¶ 14; Application by Verizon New England filed September 22, 2000 in CC Docket No. 00-176, at 1 (stating that Massachusetts has "about one-third as many access lines as New York"); *Statistics of Communications Common Carriers*, *supra*, Table 2.4 (showing that residential lines constitute approximately 63 percent of all lines served by Verizon in Massachusetts, and 64 percent of all lines served by Verizon in New York).

resulting margin would not even cover a CLEC's retailing or operating costs, much less allow for a reasonable profit.[17]

This margin analysis is directly relevant – either as a warning signal, or as confirmation – of the existence of above-TELRIC UNE prices.[18] By definition, properly computed forward-looking costs are the costs that Verizon incurs in providing the elements of its network in its own retail operations (which in turn incurs additional retailing and related costs in using the elements to offer exchange, exchange access, and other services).[19] Undoubtedly, Verizon's retail provisioning of local exchange service is profitable, even when all of these costs are considered. Indeed, Verizon has never disputed that its retail operations are profitable in all of the States in its region, including Massachusetts. When the costs that a CLEC incurs using the same network so exceed the expected revenues that a CLEC cannot operate efficiently, that is powerful evidence that UNE prices are not cost-based. At least where, as here, entrants are not using UNE-P to provide significant competition, and where, as here, the BOC has not presented any evidence showing that it is losing money providing retail service, the fact that current UNE rates yield margins that demonstrably preclude competition by efficient competitors is strong

[17] *See* AT&T *ex parte* letter filed November 30, 2000, in CC Docket Nos. 96-98, 00-176, *et al.*, including Declaration of Michael Lieberman (attached hereto as Attachment 2). AT&T is attaching a copy of the redacted version of the *ex parte* submission to these Comments as a courtesy to unredacted copy of the submission is on file at the Commission.

[18] Surprisingly, in its *SBC Kansas/Oklahoma Order*, the Commission stated that a CLEC's profit margins under current UNE rates are irrelevant to the issues of checklist compliance and to its determination of whether approval of the application would be consistent with the public interest. *See SBC Kansas/Oklahoma Order*, ¶¶ 65, 92, 281. That statement, which is largely unexplained, should not be followed here because, as explained above and in Part II, *infra*, the inability of an efficient CLEC to enter the local residential market Statewide due to overly high UNE prices is strong evidence that the BOC's UNE rates are not cost-based, and also bears directly on whether the local market is irreversibly open to competition.

[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996), ¶ 679 (*"Local Competition Order"), aff'd in part and vacated in part on other grounds sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

presumptive evidence that those rates are not truly set at TELRIC, and that scrutiny of specific TELRIC-based challenges to those rates is necessary.

In this regard, Verizon's reliance on New York only underscores the need for independent review by this Commission of whether Verizon's Massachusetts prices are TELRIC-based. Events subsequent to the approval of the New York application now clearly demonstrate that the New York UNE rates, which were set nearly four years ago, now exceed any level that could reasonably be labeled TELRIC. There is, first of all, explicit evidence, set forth in the factual submissions and analyses provided by AT&T and other CLECs in the pending pricing proceedings before the NYPSC, that the old New York rates substantially exceed cost-based levels. By virtue of Verizon's decision to rely solely on the New York proceedings to justify its Massachusetts rates as cost-based, this evidence is now directly relevant to these proceedings as well, and therefore must be considered before any rational and non-arbitrary decision could be made as to whether the Massachusetts rates are cost-based.

There is more evidence as well, both from Verizon's own public concessions, and from the CLECs' declining ability to compete in New York. First, Verizon's president and co-chief executive officer, Ivan Seidenberg, has publicly acknowledged that UNE prices in New York are so high relative to Verizon's retail rates that no CLEC can offer service at a competitive price and make a profit doing so. Only two months before Verizon imported its New York switching rates to Massachusetts (and long after Verizon's entry into the long-distance market in New York), Mr. Seidenberg told investment analysts that "leasing [Verizon's UNEs] costs AT&T

$22 per residential customer per month," so "whoever is buying [AT&T's] $24.95 [basic local services] product [in New York] knows they're not making any money on it."[20]

Second, the market has borne out Mr. Seidenberg's analysis. At least one major CLEC, Sprint, has now abandoned its efforts to sell local service to residential customers in New York and placed all of its (former) local customers with other carriers. And it is now clear that, unless the NYPSC approves a significant reduction in UNE rates, there is considerable doubt whether AT&T will continue to market UNE-P-based service to residential customers in New York.

The decelerating trend of CLEC competition in New York is therefore yet a further reason for the Commission to treat skeptically Verizon's simplistic claim that merely modeling its Massachusetts UNE rates on those in New York is sufficient to demonstrate TELRIC-compliance. The switching rates that sufficed for approving the New York application (a) are not sufficiently low to sustain UNE-based competition in New York, (b) may not be New York's switching rates tomorrow (once the NYPSC concludes its hearing), and (c) may prove not to have been New York's rates yesterday and today, for they are subject to true-up. Given the lack of significant UNE-based competition today, the clearly uneconomic margins that Verizon's UNE rates produce, and the lack of any finding that the Massachusetts (or New York) switching rates are cost-based in light of all the relevant evidence, Verizon's application should be denied.

[20] Krause, "Verizon's New York Fight Key To AT&T Challenge," Investor's Business Daily, August 15, 2000, Section A, p. 6.

3. The Recent *SBC Kansas/Oklahoma Order* Does Not Support a Finding that the Massachusetts Switching Rates Are TELRIC-Compliant.

The Commission's recent *SBC Kansas/Oklahoma Order* does not support Verizon's supplemental filing. Indeed, that *Order* makes clear why Verizon's Massachusetts application must be rejected.

Contrary to Verizon's interpretation, the Commission did not adopt a rule that approval of one BOC's rates in a Section 271 application *automatically* constitutes "approval" of comparable rates in every other state in that BOC's region. The Commission made clear that an inquiry into the circumstances of *both* the initial approval and the facts of the new applicant were essential to the Commission's analysis:

> In making such a determination [whether the UNE rate is "outside the range that the reasonable application of TELRIC principles would produce"], we agree with the Department of Justice that *we may, in appropriate circumstances, consider rates that we have found to be based on TELRIC principles.* We therefore compare SWBT's rates in Oklahoma to SWBT's rates in Texas. We do so because they are adjoining states; because the two states have a similar, if not identical, rate structure for comparison purposes; and because we have already found the rates in Texas reasonable. AT&T has compared the rates in Oklahoma to those in Kansas rather than those in Texas. Given that the Commission has already found the rates in Texas to be TELRIC-based, however, a comparison that reasonably accounts for the differences in the rates between these two states would lead us to conclude that the rates in Oklahoma are also reasonable. We note that, for the same reasons, and given the fact that Oklahoma has higher teledensity in Texas, we clearly could have approved SWBT's Oklahoma rates if it had offered UNEs in Oklahoma at the same rate as it does in Texas.[21]

The Commission then noted that "in the appropriate circumstances, such as those described above, a state would be entitled to a presumption of compliance with TELRIC if it adopted New

[21] *See SBC Kansas/Oklahoma Order*, ¶ 82 (emphasis added; footnotes omitted).

York or Texas rates in whole *and could demonstrate that its costs were at or above the costs in that state whose rates it adopted.*"[22]

Here, Verizon cannot fairly invoke any "presumption of compliance" based on the New York switching rates, for two principal reasons. First, the "circumstances" that, in the Commission's view, made reliance on the Texas UNE rates "appropriate" for Oklahoma are not present here. Whatever the other defects of using Texas recurring UNE rates as a benchmark may have been, at least those rates were not a moving target. This Commission approved the Texas recurring switching (and loop) rates without challenge from CLECs, and without deferring to any ongoing process to reset and true-up those rates.[23] Given the lack of dispute in the Texas 271 proceeding over the loop rate levels, and the evidence that (as of early 2000) those rates appeared to permit UNE-based entry, the Commission used them as a benchmark to determine – less than seven months after it approved the Texas application – whether SBC's rates for loops in Oklahoma were TELRIC-compliant. *See SBC Kansas/Oklahoma Order*, ¶ 82 (determining that comparing loop rates in Texas and Oklahoma is appropriate because "the Commission has already found the rates in Texas to be TELRIC-based").

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[22] *SBC Kansas/Oklahoma Order*, ¶ 82 n.244 (emphasis added).

[23] *Compare BA-NY Order*, ¶¶ 242-249 *with Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd. 18354 (2000) (*"SBC Texas Order"*), ¶¶ 231-242 (reviewing challenges to various nonrecurring charges challenged as non-cost-based "glue charges" and challenge to xDSL rates). The *SBC Texas Order* also makes clear that a finding by the Commission in a Section 271 proceeding that the then-applicable UNE rates for that State comply with the competitive checklist is *not* to be construed as binding precedent for the future, particularly if the rates are later shown to be inconsistent with TELRIC standards in pending proceedings before the State commission. At the time the Commission issued the *SBC Texas Order*, the TPUC was reevaluating the lawfulness of SWBT's nonrecurring charges (pursuant to a remand order of the U.S. Court of Appeals) and also was conducting a proceeding to set permanent xDSL rates. In both proceedings, the then-current rates were subject to true-up. *SBC Texas Order*, ¶¶ 233, 235, 237, 240. The Commission approved the existing "interim" rates in reliance on the true-up mechanism and its expectation that in the Texas proceedings the TPUC would "reach an appropriate result consistent with our [pricing] rules." *Id.*, ¶¶ 236, 239-240. In short, the Commission expressly recognized that the rates that the TPUC ultimately found to be TELRIC-compliant might be different than the then-existing "interim" rates, which the Commission found to be a "solution [that] is reasonable under the circumstances." *Id.*, ¶ 236.

The "circumstances" that, the Commission concluded, made it "appropriate" to use the Texas UNE rates as a benchmark for evaluating Oklahoma UNE rates do not exist here, however. The New York switching rates are interim and subject to true-up, while the Massachusetts rates are not. Moreover, the New York switching rates are also now nearly four years old, and, even more importantly, they have been thoroughly discredited in extensive and pending state pricing proceedings. Thus, the circumstances under which Verizon seeks to rely on a prior BOC's approval involve facts that are not present in this application. For that reason, the Massachusetts application must stand or fall on its own merits. Here, there is no evidence that the Massachusetts switching rates are cost-based – indeed, there is substantial evidence that they are not, and there is no State resolution to which this Commission could reasonably defer. Accordingly, the Massachusetts application must be denied.

Second, Verizon has presented virtually no evidence that its costs in Massachusetts are so uniquely similar to those in New York, as opposed to those in practically every other state, that the Commission may justifiably rely on New York rates and ignore any comparison to other states. The only "evidence" to which Verizon points are its assertions of a "common corporate heritage," a "common set of engineering practices," and similar mixes of switch types between the two States.[24] Such superficial assertions do not meaningfully distinguish New York from any other state,[25] and they are flatly insufficient to support a finding that the Massachusetts rates may

[24] Verizon asserts only that: (1) its New York and Massachusetts companies "share a common corporate heritage" that have caused their respective networks to be "built under a common set of engineering practices"; and (2) the mix of switch types in Massachusetts is similar to that in New York. LaCouture/Ruesterholz Supp. Decl., ¶ 180. Those assertions, however, are insufficient for the DTE or this Commission to determine whether the circumstances in Massachusetts are so similar to those in New York that the same rates meet TELRIC standards in both States.

[25] Verizon incorrectly asserts that AT&T and other long-distance carriers "claim. . . that this Commission should impose the local switching rates set by another state, which are more to their liking." Verizon Br. at 39. But AT&T has never made such "claim." AT&T's position is simply that UNE rates must be set at levels that comply with TELRIC principles and support effective competition – and that this Commission has the statutory

be found TELRIC-compliant based on New York's rates alone. Congress clearly required that a Section 271 applicant provide sufficient evidence to show compliance with the checklist in the particular circumstances of the State for which it requests long-distance authority.[26] If Verizon's "automatic-approval" theory were sustained, RBOCs would have no incentive to ensure that UNE rates in each State are cost-based, as required by the checklist. Instead, an RBOC would have every incentive to set a UNE-pricing benchmark using the highest-cost State in its region (or, perhaps, even in the country), and would then rely on that State's prices to obtain automatic approval for every other State. Indeed, that appears to be precisely what Verizon has done; it has seized on New York's rates for Massachusetts, knowing full well that those rates will not support sustained Statewide competition in either State.

Third, even assuming *arguendo* that the type of rate comparison conducted in the *SBC Kansas/Oklahoma Order* was appropriate (at least in reviewing the rates of the two States

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responsibility to ensure that Verizon's UNE rates satisfy those requirements. In any event, Verizon cannot have it both ways. Verizon-Massachusetts cannot rely on rates in another State (New York) to justify its rates and simultaneously criticize CLECs for citing switching rates in other States to show that the New York/Massachusetts rates are too high. Clearly, Verizon's resistance to comparisons to rates in States other than New York is due to the fact that the New York/Massachusetts switching rates are substantially *higher* than those currently in effect in several other States in its own region and, indeed, in most other States. In Pennsylvania, for example, the Public Utilities Commission – with Verizon's consent – adopted local switching rates of $0.001802 per minute of use for originating, and $0.001615 for terminating in September 1999. *See Nextlink Pennsylvania, Inc.*, 196 P.U.R.4th 172, 212-213 (PPUC 1999). These rates are 50 percent lower than the switching rate of $0.006858 per minute of use (which covers both originating and terminating) in New York. Although the actual TELRIC rates in Pennsylvania may be even lower than those prescribed by the PPUC, the substantial discrepancy between those rates and the New York rates is compelling evidence that the latter are not TELRIC-compliant – particularly since the Pennsylvania rates are more recent (and would therefore tend to be higher than if they had been prescribed in 1997). *See also Application of Bell Atlantic, Delaware, Inc., for Approval of Its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996,* Order No. 4542, Delaware PSC Docket No. 96-324 (issued July 8, 1997), Exh. D (prescribing switching rates that averaged $0.002781 per minute of use), *aff'd in relevant part sub nom. Bell Atlantic-Delaware, Inc.* v. *McMahon*, 80 F.Supp. 2d 218 (D. Del. 2000).

[26] *See* 47 U.S.C. § 271(d) (requiring, *inter alia*, that applicant "identify each State for which the authorization is sought," requiring the Commission "to consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell Operating Company with the requirements of" the competitive checklist, and requiring Commission to issue "a written determination approving or denying the authorization requested in the application for each State").

involved), and that such a comparison would be proper here, the Massachusetts UNE rates clearly fail to meet TELRIC standards when compared to rates that were found to comply with the checklist in previous Section 271 proceedings. Using the same cost analysis based on the USF model that the Commission applied in the *SBC Kansas/Oklahoma Order* (¶ 84), and assuming that UNE rates in Kansas, Texas, and Oklahoma are at TELRIC levels, it is clear that Verizon's switching and other UNE rates in *Massachusetts* substantially *exceed* TELRIC. For example:

- Using the absolute outputs from the Commission's Synthesis Model, and excluding expenses not associated with UNEs (which was the approach that the Commission took in the *SBC Kansas/Oklahoma Order*), the current total rates in Massachusetts for the entire UNE platform, the non-loop portions of the platform, and the loop portion of the platform exceed TELRIC by 75%, 182%, and 29%, respectively.

- Using only the *relative* outputs of the Commission's Synthesis Model, and excluding expenses not associated with UNEs, the Massachusetts rate for the UNE platform is 95% *higher* than its expected level when the Kansas UNE-P rate is used as the benchmark for TELRIC, *67% higher* than expected when the Oklahoma UNE-P rate is used as the benchmark for TELRIC, and *36% higher* than expected when the Texas UNE-P rate is used as the benchmark for TELRIC.

- Under the same relative cost outputs analysis, Massachusetts rates for the non-loop portions of the UNE platform are *222% higher* than expected when the Kansas non-loop rate is used as the benchmark for TELRIC, *114% higher* than expected when the Oklahoma non-loop rate is used as the benchmark for TELRIC, and *82% higher* than expected when the Texas non-loop rate is used as the benchmark for TELRIC.[27].

Although the relative outputs analysis indicates that the Massachusetts rates on the UNE platform and the non-loop portion of the platform are slightly below the expected TELRIC levels when the *current* New York rates are used as the benchmarks, such a comparison simply provides further corroboration of the evidence in the current NYPSC rate proceedings demonstrating that the current New York rates are, in fact, substantially in excess of TELRIC levels.

[27] *See* AT&T *ex parte* letter filed February 1, 2001 (Attachment 3 hereto); rate comparison table attached hereto as Attachment 4.

This comparison illustrates the threat that simplistic comparisons like those offered by Verizon would pose if they were applied to the pricing requirements of the checklist and the 1996 Act. Verizon's approach is, in essence, a "heads I win, tails you lose" proposition. Under that approach, a BOC would receive a presumption of checklist compliance merely by asserting that high rates in another State were "approved" by the Commission in a previous Section 271 proceeding; yet, when the rates in an approved State are *lower*, the BOC is not subject to a presumption that the rates are not TELRIC-compliant. That approach could be said to have some foundation in the Commission's recent decision on the SBC Kansas/Oklahoma application. *See SBC Kansas/Oklahoma Order*, ¶¶ 82-83. Nevertheless, it is wholly arbitrary to rely solely upon the results of TELRIC analyses in other states that allegedly support a BOC's application, while completely ignoring those that substantially undermine it. It is crucial to the future of UNE-based competition, as well as to the integrity of the section 271 review process, that the Commission ensure that each BOC applicant has truly set cost-based rates. That mandate cannot be fulfilled by according deference exclusively to those States whose UNE prices happen to support approval of a particular application.

B. Verizon's Loop Rates Also Violate the TELRIC Standard.

Although Verizon's switching rates starkly violate TELRIC, Verizon's loop rates also fail to comply with TELRIC. As WorldCom and AT&T have also previously demonstrated Verizon's Massachusetts loop rates are not set at TELRIC levels, because Verizon's unverifiable cost model produced clearly inflated estimates of loop costs. The model overstated loop costs by assuming (1) an unreasonably high cost of capital; (2) unrealistically long drop lengths in urban and suburban areas; (3) unreasonably low fill factors for fixed plant, digital loop carrier line cards

and equipment; and (4) excessive spare conduit capacity.[28] Correcting these errors would require a reduction of at least 30 percent in Verizon's loop costs.[29]

Verizon's supplemental filing does not even attempted to address this evidence on the merits. Instead, Verizon merely cites the Commission's "approval" of the "comparable" New York rates in its *BA-NY Order*. *See* Verizon Br. at 40. To begin with, such reliance is improper because Verizon has presented no evidence showing that loop costs in Massachusetts are similar to those in New York.[30] To the contrary, the type of comparative analysis conducted by the Commission in the *SBC Kansas/Oklahoma Order* shows that the loop rates are not in compliance with TELRIC. Under the above-described relative cost outputs analysis, the current loop rate in Massachusetts is *42% higher* than expected when the Kansas loop rate is used as the benchmark for TELRIC, *35% higher* than expected when the Oklahoma loop rate is used as the benchmark

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[28] *See* AT&T Reply Comments at 12-19, 23-24, 32-33, and Baranowski (Decl.) at 3-9. *See also* Bryant Reply Declaration, ¶¶ 19-23 (Verizon's loop rates are overstated by at least 9% due to its use of an inflated cost of capital and unduly low utilization factors).

[29] AT&T Reply Comments at 23-24 and Baranowski Decl. at 3

[30] Verizon suggests that the Commission should also forego any review of its loop rates because of WorldCom's pending appeal of the DTE's pricing order and the newly-initiated DTE proceeding to review UNE rates. *See* Verizon Br. at 37 & n.27, 41. Verizon's argument borders on the frivolous. In fact, the pendency of the WorldCom appeal is all the more reason why the Commission *should* review the loop rates for compliance with TELRIC standards, or (at a minimum) determine whether the issue raised by WorldCom has merit. Even if WorldCom's appeal to the District Court is successful, it could be 2 to 3 years before Verizon exhausts all possible appeals (as is its practice) and implements lower rates. If the court finds that the DTE erred, it will likely remand the case to the DTE for a redetermination of loop rates – and that proceeding would take at least several months. Similarly, in the DTE's new UNE review proceeding it will probably be the end of 2001 before the DTE issues a decision on the lawfulness of the current loop rates. Under either scenario, absent a finding by this Commission that the loop rates do not comply with TELRIC principles, Verizon will be able to continue charging its current market-foreclosing rates until the DTE renders a final determination. Permitting Verizon to charge above-TELRIC rates during this period would plainly be inconsistent with the pro-competitive objectives of the 1996 Act. In addition, given the DTE's previous failure to apply TELRIC standards, there is no assurance that the DTE would prescribe reasonable loop rates, whether on remand from the court proceeding or in the new UNE rate proceeding. *See* AT&T Reply Comments at 9-12.

for TELRIC, and *8% higher* than expected when the Texas loop rate is used as the benchmark for TELRIC.[31]

Even assuming, however, that the New York and Massachusetts loop costs and rates are "comparable,"[32] the *BA-NY Order* provides no support for Verizon's position that the Massachusetts loop rates comply with TELRIC principles. As previously discussed, at the time it made its determinations regarding UNE rates in the *BA-NY Order,* the Commission was aware that the NYPSC had already instituted a new proceeding to review the New York UNE rates -- and that those rates "may be adjusted in the future to account for newly adduced evidence." *BA-NY Order*, ¶ 247. Pricing determinations are thus not immutable, especially in the face of evidence that current UNE loop rates are not TELRIC-compliant.

Here, for example, the evidence presented by AT&T in the current NYPSC proceeding demonstrates that the current statewide average loop rate is 2.35 times Verizon's forward-looking economic costs.[33] Verizon has put forward no evidence here on which this Commission could conclude that the NYPSC will not lower Verizon's loop rates in New York based on this evidence. Thus, as with switching, Verizon Massachusetts loop rates confront this Commission with a stark dispute in which CLECs have advanced substantial evidence that the rates for a UNE element are *not* cost-based, Verizon has put no evidence into the record to

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[31] *See* Attachment 4 hereto. Although this analysis indicates that the Massachusetts loop rates are slightly lower than expected when the current New York loop rates are used as the benchmark for TELRIC, that comparison simply further confirms that both the Massachusetts and New York rates exceed TELRIC levels.

[32] In fact, when calculated at standard input volumes, the tariff loop rate in Massachusetts is $15.14, but only $14.41 in New York. *See* Attachment 3 hereto (table comparing tariffed UNE rates).

[33] *See* AT&T NYPSC Testimony at 5-6, 37, 53-108 (Attachment 1 hereto). AT&T's testimony before the NYPSC shows that the loop cost study presented by Verizon suffered from numerous deficiencies, including the use of an overstated cost of capital and erroneous asset lives, a seriously flawed retail avoided cost study, and a failure to account for Verizon's inefficient engineering practices. *Id.* at 53-108. When these errors are corrected, the current loop rate is 2.35 times Verizon's costs. *Id.* at 37.

support its position on the dispute, and neither the Massachusetts commission nor the New York commission on which Verizon relies has resolved the issue. In these circumstances, there is no rational basis upon which the Commission could find that Verizon has carried its burden of proof to demonstrate that its rates are TELRIC-based.

II. APPROVAL OF VERIZON'S MASSACHUSETTS APPLICATION AT THIS TIME IS NOT IN THE PUBLIC INTEREST

The foregoing analysis demonstrates that Verizon has not demonstrated -- and cannot show -- that its UNE rates are cost-based. That fact alone requires rejection of the application. But even if the Commission were to conclude that Verizon's UNE rates comply with TELRIC, the Commission should still deny the application because, in the absence of significant and irreversible competition for residential customers, Verizon's entry into the long-distance market would not be in the public interest, convenience, and necessity.

According to Verizon's data, Verizon serves no more than 16,900 residential lines through the UNE platform in Massachusetts.[34] This amounts to only about one-half of one percent of total residential lines in Massachusetts, and less than 3 percent of the 800,000 "competitive lines" in the State. Even Verizon acknowledges that the latter percentage constitutes a "tiny fraction" of the total.[35] This limited UNE-P entry stands in stark contrast to the level of UNE-P activity in New York and Texas, and demonstrates that the local residential market is not irreversibly open to competition.

For example, at the time Verizon and SBC filed their respective applications, approximately 152,000 lines in New York, and 244,000 lines in Texas, were being served through

[34] *See* fn.4, *supra*.

[35] *See* Verizon Br. at 4 (stating that DSL loops "represent a tiny fraction of the local competition in Massachusetts," because they represent "less than 2.5 percent" of all competitive lines).

the UNE platform.[36] Since both New York and Texas have fewer than 3 times the number of residential lines that Massachusetts has,[37] the fact that New York had nearly *10 times* the number of UNE-P lines, and that Texas had about *13 times* as many UNE-P lines, vividly illustrates the moribund state of UNE-P competition in Massachusetts. Moreover, in both New York and Texas, the record showed that many scores of thousands more UNE-P orders were in the pipeline, whereas no such showing has been made in Massachusetts.[38] This contrast between Massachusetts and Texas/New York in the level of UNE-P competition is of particular significance because, in both the Texas and the New York orders, the Commission relied heavily on its finding of "thriving" residential UNE-P competition in approving the applications.[39] Finally, there is no substantial resale or facilities-based residential competition in Massachusetts.[40] From any perspective, then, it is clear that the local residential market in Massachusetts is not yet irreversibly open to competition.

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[36] *BA-NY Order*, ¶ 14; *SBC Texas Order*, ¶ 5.

[37] *See Statistics of Communications Common Carriers, supra*, Table 2.4.

[38] *See* Affidavit of Robert Aquilina filed October 19, 1999, on behalf of AT&T in CC Docket No. 99-295, ¶ 11 (describing volume of UNE-P orders AT&T planned to submit in New York in 2000).

[39] *See* BA-NY Order ¶ 14; *see also* SBC Texas Order, ¶ 5.

[40] Verizon's claims regarding cable-based competition for residential customers are vastly overstated. As AT&T set forth in the Declaration of David J. Kowolenko, dated Oct. 16, 2000, and filed with AT&T's initial comments on the Massachusetts application (CC Docket No. 00-176), "the majority of residential customers in Massachusetts do not have access to cable-based telephony services." Kowolenko Decl. ¶ 9; *see id.* ¶¶ 3-8.

Verizon's data also reveal only limited residential competition based on resale which is, in any event, an inherently limited competitive vehicle. Resale does not permit entry into the entirety of the local market, because it does not enable a competitor to provide exchange access services. It also denies the competitor the ability to offer distinctive services (because resellers are limited to the incumbent's services), and it does not allow the reseller to offer vigorous price competition (because its price is not based on economic costs). Verizon's previous application stated that only 32,000 of the 214,000 customers served by resale in Massachusetts as of July were residential customers. *See* Declaration of William E. Taylor, Att. A, Exh. 2. Given the limited use of resale to serve residential customers in the past, it is reasonable to conclude that residential customers account for only a small fraction of the approximately 30,000 resold lines since July. *See* Verizon Br., Att. B.

The absence of significant and irreversible residential competition is not simply relevant to the public interest – it should be dispositive. As the Commission recently stated, the public interest requirement focuses on whether, *even assuming checklist compliance*, the local market is irreversibly open to competition:

> [T]he public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we review the public interest requirement as an opportunity to review the circumstances presented by the application to ensure *that no other relevant market factors exist that would frustrate the congressional intent that markets be open*, as required by the competitive checklist, *and that entry will therefore serve the public interest as Congress intended.*

SBC Kansas/Oklahoma Order, ¶ 267 (emphasis added).[41] To evaluate the public interest with respect to Massachusetts, then, the Commission must consider the market factors responsible for the lack of residential competition, as well as whether Verizon's entry into the long distance market at this time will promote or undermine achievement of the Act's goals.

As for the reasons why residential competition is not yet irreversibly established in Massachusetts, at least two related and relevant market factors are at work. First, it is indisputable that prior to October 13, 2000, competitors lacked cost-based UNE rates in Massachusetts. Indeed, UNE-rates were so far above TELRIC levels that no potential competitor could have seriously considered broad-based, Statewide residential entry based on the then-existing UNE rates, which were typically higher than the retail rates Verizon charges to end users.

Second, the record shows that, even with Verizon's belated rate-reductions last October, Verizon's Massachusetts rates remain far too high to attract and sustain broad-based residential competition. Regardless of whether Verizon's new rates are found to comply with

[41] *See also SBC Texas Order*, ¶ 417; *BA-NY Order*, ¶ 423.

TELRIC, Verizon has introduced no evidence to counter the CLECs' margin analysis that shows -- beyond any reasonable doubt -- that UNE-P entry is not profitable in Massachusetts under the current rates. As noted above, AT&T's analysis shows that Verizon's current rates would provide CLECs entering statewide with a *gross* margin of between $1.52 and $3.78 per customer per month, which is patently insufficient to cover any CLEC's retailing costs, operating costs, and need to produce a reasonable profit, no matter how efficient that CLEC was.[42] This analysis thus confirms that, as a result of continuing high UNE prices, the local residential market remains closed to competitors seeking UNE-based entry.

In this regard, the CLECs' margin analysis is a "market factor" that is particularly relevant to whether competitive entry is feasible even assuming all other conditions of entry, including a finding of TELRIC-compliant prices, are met. It is true that the 1996 Act does not guarantee any individual CLEC a profit. But where an analysis of UNE rates as compared to retail revenues demonstrates that UNE rates are so high as to preclude *any efficient* CLEC from profitably offering UNE-P on a statewide basis, that analysis is directly relevant to the ultimate public interest issue, *i.e.*, whether the local market is irreversibly open to competition. The cost of UNEs is a critical input in any UNE-based entry strategy. And as the Commission well knows, for the foreseeable future, UNE-based entry offers the only near-term prospect of statewide residential competition. Where, as here, the cost of critical UNE inputs is too high to support competition, the market cannot be regarded as open to competition.

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[42] *See* AT&T *ex parte* letter filed November 30, 2000, in CC Docket Nos. 96-98, 00-176, *et al.*, including Declaration of Michael Lieberman (attached hereto as Attachment 2). Although the Commission stated, in its *SBC Kansas/Oklahoma Order*, that the issue of CLEC profit margins was irrelevant to both checklist compliance and the public interest, it should not apply that standard here, in light of its obvious relevance to both issues, as explained above. *See SBC Kansas/Oklahoma Order*, ¶¶ 65, 82, 281.

The key facts, therefore, for the Commission to consider in assessing the public interest are that (i) there is no significant Statewide residential competition today and (ii) Verizon's high UNE prices loom as an independent and fully sufficient barrier to significant residential market-entry, both today and for the indefinite future. In these circumstances, approval of Verizon's Section 271 application cannot be in the public interest.

The Act makes clear that achieving meaningful competition in residential, as well as business, markets was a key statutory goal. *E.g.*, 47 U.S.C. § 271(c)(1)(A). Approving an application where a BOC's residential market indisputably remains virtually invulnerable to meaningful competition would simply permit the BOC to "remonopolize" the long-distance market. Because its high UNE rates protect the BOC from any significant statewide residential competition, a BOC with interLATA authority would be the only firm capable of satisfying consumer demand for one-stop shopping for combinations of local and long-distance. And the BOC would have this unique marketplace advantage, not by dint of having a superior product, but simply by virtue of the fact that it never fully opened its local residential monopoly to competition.

Approving a BOC's 271 application in such circumstances could not be in the public interest. Indeed, it would leave residential consumers worse off than they were before the 1996 Act was passed. Rather than provide meaningful alternatives for ***both*** local and long distance telephone service, such premature approval of a BOC's application would leave consumers with no choice *either* for local *or* for bundled services. There would also be little hope for increased competition in the future, for the BOC would have then lost its chief incentive to make its essential facilities available to competitors on nondiscriminatory terms and conditions. The ultimate outcome would be higher prices for consumers, and increased pressure on regulators

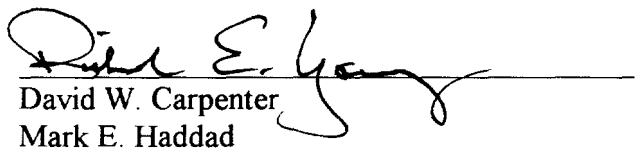
to re-regulate the once-again monopolized residential phone market – precisely the opposite of what Congress intended when it passed the 1996 Act.

The Commission should therefore insist that a BOC demonstrate that all of its markets – including those for residential consumers – are fully and irreversibly open to competition before finding any application to be in the public interest. In particular, the Commission should demand evidence that (1) UNE prices have been set at levels that permit an efficient CLEC to compete on a statewide basis for residential as well as business customers, and (2) such prices have been established for a sufficient period of time – at least six months – prior to the application, to permit a CLEC to develop and execute a business plan to enter the state, test the availability of other checklist items, and establish a presence significant enough to permit the Commission to conclude that the market is, in fact, irreversibly open to competition. As Verizon has not and cannot yet make this showing for Massachusetts, its application should be denied.

CONCLUSION

For the reasons stated, AT&T respectfully submits that Verizon's Application should be denied.

Respectfully submitted,



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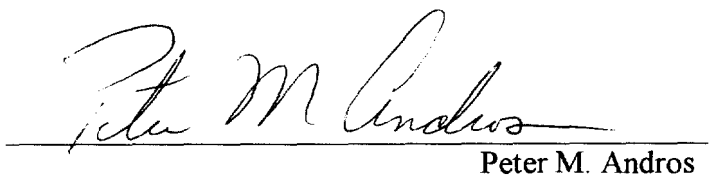
February 6, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2001, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: February 6, 2001
Washington, D.C.



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